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Attorneys for Plaintiff Gary Wunsch

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
PHOENIX DIVISION

GARY WUNSCH, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

v.

COLE REAL ESTATE INVESTMENTS,
INC., CHRISTOPHER H. COLE,
THOMAS A. ANDRUSKEVICH, MARC
T. NEMER, SCOTT P. SEALY, SR.,
LEONARD W. WOOD, AMERICAN
REALTY CAPITAL PROPERTIES,
INC., and CLARK ACQUISITION, LLC,

Defendants.

Case No.: 2:13-cv-02186-PHX-HRH

CORRECTED JOINT STATUS REPORT

1 Pursuant to the Court's February 14, 2014 Order (Document No. 53), plaintiff
2 Gary Wunsch ("Plaintiff") and defendants Cole Real Estate Investments, Inc. ("Cole"),
3 Christopher H. Cole, Thomas A. Andruskevich, Marc T. Nemer, Scott P. Sealy, Sr.,
4 Leonard W. Wood, American Realty Capital Properties, Inc. ("ARCP"), and Clark
5 Acquisition, LLC (collectively, "Defendants") submit this Joint Status Report.

6 On October 25, 2013, Plaintiff filed the Class Action Complaint (Document No.
7 1).

8 Beginning on October 30, 2013, eight complaints asserting the same or
9 substantially similar claims were filed and thereafter consolidated by order of the Circuit
10 Court for Baltimore City Maryland (the "Maryland Action").

11 On December 3, 2013, Plaintiff filed the Amended Class Action Complaint
12 (Document No. 20).

13 On January 10, 2014, the parties in the Maryland Action entered into a
14 Memorandum of Understanding ("MOU") detailing the terms of a proposed global
15 settlement that will likely render Plaintiff's claims moot (the "Maryland Settlement").

16 On January 23, 2014, the shareholders of ARCP and Cole approved the proposed
17 merger that formed the basis of both the Maryland Action and Plaintiff's action.

18 On February 14, 2014, the Court stayed all further proceedings in Plaintiff's action
19 in light of the Maryland Settlement and instructed the parties to provide updated status
20 reports to the Court every 30 days, beginning on March 31, 2014 (Document No. 53).

21 On August 14, 2014, the parties in the Maryland Action executed a Stipulation and
22 Release and Agreement of Compromise and Settlement (the "Original Stipulation"). The
23 parties in the Maryland Action submitted the Original Stipulation, along with related
24 filings, for approval by the Maryland court on August 18, 2014.

25 On August 25, 2014, the Maryland court entered an Order on Preliminary
26 Approval of Derivative and Class Action Settlement and Class Action Certification (the
27 "Preliminary Approval Order"). Pursuant to the Preliminary Approval Order, Defendants
28

1 mailed the Notice of Pendency of Derivative and Class Action to the Cole shareholders
2 on October 7, 2014 (the "Class Notice").

3 On October 29, 2014, ARCP issued a press release and filed a Form 8-K with the
4 U.S. Securities and Exchange Commission (the "ARCP Accounting Announcement")
5 describing an investigation into accounting and financial issues at ARCP for the fiscal
6 year ending December 31, 2013 and the first and second quarters for the fiscal year
7 ending December 31, 2014 (the "ARCP Accounting Issues").

8 On November 21, 2014, in accordance with the Class Notice, Plaintiff filed a
9 timely objection to the Maryland Settlement with the Maryland court (the "Objection").
10 The Objection alleges that the proposed release of claims contained in the Original
11 Stipulation (the "Release") is overbroad insofar as it would extinguish those claims
12 arising from the announcement of the ARCP Accounting Issues and, consequently,
13 renders the Maryland Settlement unfair, unreasonable, and not in the best interests of the
14 former Cole (and now ARCP) shareholders. A copy of the Objection is attached hereto
15 as Exhibit A.

16 Three days later, on November 24, 2014, counsel in the Maryland Action sent
17 Plaintiff's counsel a letter, informing them that the Release in the Original Stipulation had
18 been modified to include a "broad 'carve out' of the claims against [ARCP] and its
19 privies" arising from the ARCP Accounting Announcement. Maryland counsel also
20 included a draft of the proposed Amended Stipulation and Release and Agreement of
21 Compromise and Settlement (the "Amended Stipulation") which included the revised
22 Release language.

23 At present, plaintiffs in the Maryland Action intend to submit their opening brief
24 in support of the Maryland Settlement along with their application for attorneys' fees and
25 expenses on December 4, 2014, with any additional objections by Plaintiff due to the
26 Maryland court on or before December 8, 2014. A final settlement hearing in the
27 Maryland Action remains scheduled for December 12, 2014. Plaintiff is currently still
28

1 evaluating whether he anticipates appearing at the final approval hearing to present oral
2 argument in support of his Objection.

3 The parties will continue to update this Court via additional monthly reporting.

4 Dated: December 2, 2014

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19 *Liaison Counsel and Counsel for Plaintiff*
20 *Gary Wunsch*

21 Dated: December 2, 2014

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14 *Scott P. Sealy, Sr., and Leonard W. Wood*

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1 Dated: December 2, 2014

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13 *Capital Properties, Inc., and Clark*
14 *Acquisition, LLC*

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26 998380
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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2014, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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4 *Andruskevich*

s/ Stephen J. Oddo

STEPHEN J. ODDO

Exhibit A



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NOV 21 PM 2:49
CIVIL DIVISION
November 21, 2014

VIA HAND DELIVERY

Clerk
Circuit Court for Baltimore City
Courthouse East - Room 209
111 North Calvert Street
Baltimore, MD 21202

Re: Objection to Settlement in *Polage v. Cole*, C.A. No. 24-C-13-006665

Dear Clerk of the Court:

Gary Wunsch, a member of the shareholder class certified in the above-captioned action ("Action") challenging the acquisition of Cole Real Estate Investments, Inc. ("Cole") by American Realty Capital Properties, Inc.'s ("ARCP") (the "Acquisition"), hereby submits this notice of intention to appear before the Court through his counsel, Robbins Arroyo LLP, and present argument as to why the proposed settlement ("Settlement") should not be approved (the "Objection").¹ Below, Mr. Wunsch provides a statement of the grounds upon which his Objection is based. It supports a finding that *the Settlement is not fair, reasonable, adequate, or in the best interests of the Class* and, consequently, *should not be approved* unless and until its terms are modified to exclude the release of those claims relating to (or arising from) the October 29, 2014 announcement revealing that ARCP had engaged in "unacceptable" accounting practices that rendered certain of its U.S. Securities and Exchange Commission ("SEC") filings, earnings releases, and other financial communications unreliable (the "October 29 Press Release").²

A. The Acquisition, Settlement, and October 29 Press Release

On October 23, 2013, Cole and ARCP publicly announced the Acquisition pursuant to which ARCP would acquire each outstanding share of Cole common stock in exchange for either 1.0929 shares of ARCP common stock or \$13.82 in cash. This Action was commenced shortly thereafter, alleging that defendants breached their fiduciary duties (or aided and abetted such

¹ In its Order on Preliminary Approval of Derivative and Class Action Settlement and Class Certification (the "Preliminary Approval Order"), the Court certified, for settlement purposes, a class comprised of "[a]ll persons or entities who held shares of [Cole] common stock ... at any time between March 5, 2013 and February 7, 2014" (the "Class"). Mr. Wunsch has provided proof of his status as a Class member, attached hereto as Exhibit A.

² That same day, ARCP also filed a Current Report on Form 8-K with the SEC reiterating the information contained in the October 29 Press Release.

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Wunsch Objection to Settlement

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breaches) in connection with the Acquisition and seeking to enjoin the consummation of the Acquisition.³ An amended complaint was later filed which added claims that the Form S-4 Registration Statement ("Proxy") filed with the SEC on November 5, 2013 in connection with the Acquisition was materially false and misleading.

On January 10, 2014, the parties entered into a Memorandum of Understanding outlining their tentative settlement agreement. In consideration for the dismissal of the Action defendants agreed to, among other things, remedy the disclosure deficiencies in the Proxy and establish a \$14 million settlement fund to be distributed to the Class members on a pro rata basis. With the threat of an injunction removed, the former Cole shareholders voted to approve the Acquisition at a special meeting held on January 23, 2014 and the transaction officially closed on February 7, 2014.⁴ The parties have since prepared a stipulation of settlement (the "Stipulation") which was filed with the Court in conjunction with the parties' request for preliminary approval of the Settlement.

On August 25, 2014, the Court issued its Preliminary Approval Order which (i) certified, tentatively and solely for settlement purposes, the Class; (ii) authorized the mailing of a notice of settlement to the former Cole shareholders comprising the Class; and (iii) scheduled a date for the parties to present the Settlement to the Court for final approval (the "Settlement Hearing"). Additionally, the Preliminary Approval Order set-out the procedure for Class members to appear at the Settlement Hearing and show cause as to why the Settlement should not be approved. *See* Preliminary Approval Order at 1-5.

Just over three weeks ago, ARCP issued the October 29 Press Release announcing that its previously issued financial statements, earnings releases, and other financial communications and information included in its past SEC filings were unreliable due to Cole insiders' intentional adoption of unacceptable accounting practices that resulted in, among other things, Cole's prior net losses being understated and its adjusted funds from operations being overstated (the "Accounting Problems"). The investigation by Cole's Audit Committee into the Accounting Problems is ongoing and, until it is complete, there is no way to know the extent to which they impacted Cole's financial statements as relied upon in negotiating the Acquisition.

Cole's stock price plummeted following the publication of the October 29 Press Release – closing down \$2.38 per share (almost 19%) from the previous day's closing price of \$12.38. It has since dropped even further, closing at just \$8.77 per share on November 19, 2014.

³ Mr. Wunsch filed a related action challenging the Acquisition in the U.S. District Court for the District of Arizona on October 25, 2013 (the "*Wunsch* Action"). On February 14, 2014, the *Wunsch* Action was stayed pending the outcome of this Action.

⁴ As a result of the Acquisition, Mr. Wunsch's 3000 Cole shares were tendered in exchange for 3,278 shares of ARCP. Mr. Wunsch purchased an additional 722 shares of ARCP on August 29, 2014 bringing his total ownership of ARCP to 4000 shares, all of which he still owns.

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B. The Settlement Release Is Overbroad and Adversely Impacts the Ability of the Class to Pursue Claims Arising from the October 29 Press Release

If approved, the Settlement would release and extinguish those meritorious claims arising from the announcement of the Accounting Problems in the October 29 Press Release. Indeed, the Stipulation broadly defines "Released Claims" to include:

[A]ll known and unknown claims, demands, rights, actions, causes of action, liabilities, damages, losses, obligations, judgments, amounts, duties, suits, costs, expenses, matters, and issues, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, liquidated or unliquidated, matured or unmatured, accrued or unaccrued, apparent or unapparent, including Unknown Claims (defined below) that have been, could have been, or in the future can or might be asserted in any court, tribunal, or proceeding (including but not limited to any claims arising under federal, state, foreign, or common law, including the federal securities laws and any state disclosure law), by or on behalf of the Releasing Persons (defined below), whether individual, direct, class, derivative, representative, legal, equitable, or any other type or in any other capacity against the Released Persons (defined below), which have arisen, could have arisen, arise now, or hereafter may arise out of or relate in any manner to the allegations, facts, events, transactions, acts, occurrences, statements, representations, misrepresentations, omissions or any other matter, thing, or cause whatsoever, or any series thereof, embraced, involved, set forth or otherwise related to the Action, the Cole Holdings Acquisition (including the negotiation or consideration of the Cole Holdings Acquisition or any agreements or disclosures relating thereto), the Transaction (including the negotiation or consideration of the Transaction or any agreements or disclosures relating thereto), the Cole Holdings Merger Agreement, the Merger Agreement, or any preliminary or definitive joint proxy statement, proxy solicitation material, or other written material in connection with the solicitation or offer of securities, including supplements and amendments, filed or distributed to stockholders in connection with the Cole Holdings Acquisition or the Transaction (including without limitation the Preliminary Proxy Statement and the Definitive Proxy Statement), including without limitation any disclosures nondisclosures or public statements made in connection with any of the foregoing; provided, however, that the Released Claims shall not include the right to enforce the Settlement, or any aspect thereof, or the Stipulation.

Stipulation, ¶6(a) (emphasis added). Such encompassing language in the Release would inevitably prevent Mr. Wunsch and the other former Cole shareholders from bringing claims (either directly or derivatively) to recover the damages suffered as a result of defendants fraudulently inducing them to exchange their Cole shares for ARCP shares in connection with the Acquisition.

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In total, the former Cole shareholders received an estimated 408.4 million shares of ARCP common stock in connection with the close of the Acquisition on February 7, 2014. At that time, ARCP was trading at nearly \$14 per share. Now, just nine months later, those same shares are trading at less than \$10 per share due to the admittedly intentional and unreasonable Accounting Problems announced in the October 29 Press Release. This roughly \$1.6 billion in one-day losses suffered by the former Cole (and current ARCP) shareholders is a direct result of the materially false and misleading financial statements disclosed to the public by ARCP and its executives. Even worse, ARCP and its management's reputation have taken a considerable hit, further driving down the trading price of ARCP stock as investors flee and limiting the chance for near-term recovery. The Settlement does not account for these damages suffered by the Class nor does the Action even assert claims related thereto. Still, the parties seek approval of the Settlement which would prevent any members of the Class from asserting these claims (or any similar claims) now or in the future. This would severely prejudice Mr. Wunsch and any other Class members' rights and interests as new ARCP shareholders and should not be allowed.

The strength of the claims Mr. Wunsch seeks to carve-out of the Stipulation's Release is evidenced by a number of factors. First, there have been no less than seven (7) securities fraud complaints filed since the publication of the October 29 Press Release along with at least one derivative action and countless press releases by law firms announcing their investigation into the Accounting Problems at ARCP.⁵ Moreover, investigations into the Accounting Problems were opened by the SEC, the Federal Bureau of Investigations, and the U.S. Attorney within just three days of the October 29 Press Release. Finally, thousands of brokerages refused to sell non-publicly traded entities owned and operated by certain ARCP insiders, analysts suspended their coverage of ARCP, and RCS Capital Corporation backed out of its \$700 million deal to by Cole Capital Advisors, Inc. from ARCP – all in the immediate aftermath of the Accounting Problems being announced.⁶

C. Mr. Wunsch's Rationale for Wanting to Appear at the Settlement Hearing

In light of the billions of dollars of damage suffered by the Class as a result of the drop in the trading price of ARCP stock following the October 29 Press Release, Mr. Wunsch believes it is imperative that he be given the opportunity to further present (through counsel) those

⁵ The existence of these other actions is irrelevant with regard to the Court's analysis of this Objection. There is no indication that the shareholder representatives in such cases will adequately represent Mr. Wunsch's interest. Moreover, as Mr. Wunsch and the other Class members obtained their ARCP shares in connection with the Acquisition, their claims are not necessarily subject to the same requirements as a typical ARCP shareholder, thus presenting questions as to whether they could even be litigated by a non-former Cole shareholder in the class action context.

⁶ ARCP executives even acknowledge that the Accounting Problems were "intentionally made" and "intentionally not corrected" – a fact further evidenced by the sudden departures of those executives that played key roles in the preparation of the misstated financials.

Polage v. Cole, C.A. No. 24-C-13-006665

Wunsch Objection to Settlement

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arguments in support of this Objection. The former Cole shareholders will be severely prejudiced if the Settlement is approved without modification to the Release and the claims related to or arising from the Accounting Problems at ARCP are subsequently extinguished without proper consideration. The extent of such potential prejudice (to the tune of over \$1.6 billion for Class members), alone, warrants Mr. Wunsch's appearance at the Settlement Hearing.

* * * * *

Based on the foregoing, it is clear that the Settlement should be rejected in its current form as being unfair, unreasonable, and not in the best interests of the former Cole shareholders. Accordingly, Mr. Wunsch requests that the Court decline to approve the Settlement until the claims against ARCP and its executives that relate to the October 29 Press Release and underlying Accounting Problems are adequately carved from the Release contained in the Stipulation.

Sincerely,

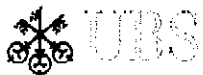


Justin D. Rieger

Enclosures

cc: Honorable Pamela J. White (via overnight delivery)
Charles J. Piven, Esq. (via overnight delivery and e-mail)
Andrew J.H. Cheung, Esq. (via overnight delivery and e-mail)
Rebecca M. Lamberth, Esq. (via overnight delivery and e-mail)

Exhibit A



UBS Strategic Advisor
June 2013

Account name: GARY K WUNSCH
Account type: Individual Retirement Account
Account number: Redacted

Your Financial Advisor:
Redacted

Account activity this month (continued)

Investment transactions (continued)

Date	Activity	Description	Quantity	Value (\$)	Price (\$)	Proceeds from investment transactions (\$)	Funds withdrawn for investments bought (\$)	Accrued interest (\$)
Redacted								
Jun 26	Bought	COLÉ REAL ESTATE INVTS INC UNSOLICITED	1,000.000		10.87		-10,870.00	

Redacted

Total

Redacted

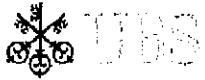
Securities transferred in

Date	Activity	Description	Amount (\$)
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Money balance activities

Redacted





UBS Strategic Advisor
July 2013

Account name: GARY K WUNSCH
Account type: Individual Retirement Account
Account number: Redacted

Your Financial Advisor:
Redacted

Your assets (continued)

Your total assets

Account activity this month

	Date	Activity	Description	Amount (\$)
Dividend and Interest income				
Dividends				
Interest				

	Date	Activity	Description	Amount (\$)
Fees				

Investment transactions

For more information about the price/value shown for restricted securities, see *Important information about your statement* at the end of this document.

Date	Activity	Description	Quantity	Value (\$)	Price (\$)	Proceeds from investment transactions (\$)	Funds withdrawn for investments bought (\$)	Accrued interest (\$)
Jul 1	Bought	COLE REAL ESTATE INVTS INC UNSOLICITED	1,000.000		10.88		-10,880.00	
Jul 1	Bought	COLE REAL ESTATE INVTS INC UNSOLICITED	1,000.000		10.81		-10,810.00	

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Resource Management Account
February 2014

Account name: GARY K WUNSCH
Account type: Individual Retirement Account
Account number: Redacted

Your Financial Advisor:

Redacted

Account activity this month (continued)

Date	Activity	Description	Amount (\$)
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Dividend and interest income (continued)

Dividends (continued)

Redacted

Interest

Miscellaneous

Total miscellaneous

Total dividend and interest income

Redacted

Investment transactions

For more information about the price/value shown for restricted securities, see *Important information about your statement* at the end of this document.

Date	Activity	Description	Quantity	Value (\$)	Price (\$)	Proceeds from investment transactions (\$)	Funds withdrawn for investments bought (\$)	Accrued interest (\$)
Redacted								
Feb 7	Cash In Lieu	AMERICAN RLTY CAP PPTYS INC REITS SBI				9.85		
Feb 7	Exchange	AMERICAN RLTY CAP PPTYS INC REITS SBI	3,278.000					
Feb 7	Exchange	COLE REAL ESTATE INVTS INC MERGER - EFF-03/2014 SBI	-3,000.000					

Redacted

Total

Securities transferred in

Securities transferred out

Redacted





Retirement Account
July 2014

Account name: GARY K WUNSCH
Account type: Individual Retirement Account
Account number: Redacted

Your Financial Advisor:

Redacted

Account activity this month (continued)

	Date	Activity	Description	Amount (\$)
Other funds debited	Jul 9	Deliver	CREDIT CASH BALANCE	-343,331.02
	Jul 14	Deliver	CREDIT CASH BALANCE	-4.58
	Total other funds debited			-\$343,335.60

Investment transactions

For more information about the price/value shown for restricted securities, see *Important information about your statement* at the end of this document.

Date	Activity	Description	Quantity	Value (\$)	Price (\$)	Proceeds from investment transactions (\$)	Funds withdrawn for investments bought (\$)	Accrued interest (\$)
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Redacted

Jul 9	Deliver	AMERICAN RLTY CAP PPTY INC REITS SBI	-3,278.000	-40,778.32				
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Redacted

continued next page



Settlement Date: 08/20/2014

09/15/2014 DIVIDEND RECEIVED

Cash

Redacted

08/29/2014 YOU BOUGHT

ARCP

AMERICAN RLTY CAP PPTYS INC COM

Cash

Shares: +541.000

Price: \$13.1699

Amount: -\$7,132.87

Comm: \$7.95

Settlement Date: 09/04/2014

08/29/2014 YOU BOUGHT

ARCP

AMERICAN RLTY CAP PPTYS INC COM

Cash

Shares: +181.000

Price: \$13.165

Amount: -\$2,382.87

Settlement Date: 09/04/2014

08/15/2014 DIVIDEND RECEIVED

Cash

Redacted

07/09/2014 TRANSFER OF ASSETS ACAT RECEIVE

ARCP

AMERICAN RLTY CAP PPTYS INC COM

Cash

Shares: +3,278.000

Account Level History:**Redacted**